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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/635,919

08/06/2003

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5858-00800

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07/21/2009

EXAMINER

SWIGER III, JAMES L

ART UNIT

PAPER NUMBER

3775

MAIL DATE

DELIVERY MODE

07/21/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/635,919	<b>Applicant(s)</b> ZEILER ET AL.	
	<b>Examiner</b> JAMES L. SWIGER	<b>Art Unit</b> 3775	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 April 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 17-19, 21, 22 and 29-34 is/are pending in the application.
- 4a) Of the above claim(s) 17-19, 21 and 22 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 29-34 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 19 September 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>4/30/2009; 6/9/2009</u> .                                     | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 29-34 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In claim 29, line 12, applicant claims "protruding from the side surface." Applicant has not defined what is meant by "the side surface" per se. Applicant has only defined an *opposing* side surface, which is interpreted as the side facing away from the bone. "The" side surface may be another side. For examination purposes, the side surface will be considered the opposing side surface; appropriate correction is required.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 29, 31-32, 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Herzberg (US Patent 4,988,350) in view of Sioufi (US patent 5,409,489). Herzberg discloses an implant plate for stabilizing a fracture comprising a plate member (Fig. 17), with an edge (20) that defines a head end portion (25a) and a shaft end portion (24) that is narrower than the head portion (see view in Fig. 17), and wherein the plate has a

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bone facing side (Fig. 18, to the left) and an opposing-side facing surface (to the right fig. 18), a plurality of holes (26) both the head and shaft portion (see Fig. 17) which enable the plate to be fixed to bone. Herzberg further disclose an implant plate at least one receiving member (129) protruding from the plate (Fig. 18, 129), that is located on the head portion and is considered proximate to the edge. Flexible members such as cerclage wires may be passed through these receiving members and then tightened to assist in securing the bone plate to the bone surface for fixation. The plate also has a slight curvature towards the head and may also be made of high-quality materials that are known types in the art (Col. 8, lines 10-17).

Herzberg discloses the claimed invention except for discrete, circumferentially enclosed apertures that extend from the bone plate for securing flexible members. Sioufi discloses a plate with a head and shaft portion that also has circumferentially enclosed apertures (88) extending from the side of the plate at the head end. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the device of Herzberg having the receiving member replaced with circumferentially enclosed apertures as taught by Sioufi, as doing so would ensure that the flexible members used to secure the plate do not move or become dislocated.

Claims 30 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Herzberg in view of Sioufi. Herzberg in view of Sioufi discloses the claimed invention except for the plate having substantially uniform thicknesses such as from 0.5 to 6.5 mm and 0.8 to 3.5 mm. It would have been obvious to one having ordinary skill in the art at the time the invention was made to construct the bone plate with the above

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ranges, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

### ***Response to Arguments***

Applicant's arguments with respect to claims 29-34 have been considered but are moot in view of the new ground(s) of rejection. Applicant amendments to the claims and arguments submitted 4/30/2009 have been fully considered and the previous rejection withdrawn. However it is still held that the claims still read on the prior art of record. Further rejections are found above.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES L. SWIGER whose telephone number is (571)272-5557. The examiner can normally be reached on M-F 9-530.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Thomas Barrett can be reached on 571-272-4746. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JAMES L. SWIGER/  
Examiner, Art Unit 3775

/Thomas C. Barrett/  
Supervisory Patent Examiner, Art  
Unit 3775